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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

No. [redacted] 78

October Term 1953

NEIL S. McCARTHY, MARGUERITE G. McCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of RALPH R. HUESMAN, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petitioners' Reply to Answer of Respondent to Petition for Writ of Certiorari to the Supreme Court of California.

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IN THE

Supreme Court of the United States

October Term 1953

No. 765

NEIL S. MCCARTHY, *et al.*,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petitioners' Reply to Answer of Respondent to Petition for Writ of Certiorari to the Supreme Court of California.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners hereby reply to Answer of Respondent to Petition for Writ of Certiorari to the Supreme Court of the State of California.

Respondent's Amplification of Petitioners' Summary Statement of the Case Is Somewhat Inaccurate.

Respondent has set forth under ten numbered paragraphs (Ans. pp. 2-4) what are designated as material facts omitted from petitioners' Summary Statement of the Case. The purported facts stated by respondent are, in many instances, not material and are inaccurate and

incomplete. We will discuss the same seriatim in the order in which they appear in respondent's Answer.

1. Respondent states that although petitioners' property was zoned for residential purposes for a period of eighteen years immediately prior to the adoption of the ordinance in question, not a single residence was constructed on said property during said period. Respondent failed to state that for fourteen of the eighteen years mentioned the respondent clouded the title to the property by instituting, maintaining and unsuccessfully prosecuting, to the state court of last resort, proceedings seeking to quiet title in the respondent to the property on the theory that the property had been dedicated to public use (see Pet. p. 3).

Respondent calls attention to the fact that approaching one year prior to the adoption of the ordinance in question, in an advertisement appearing in a local newspaper, Mr. McCarthy stated that he expected to enclose the property and charge admission for its use. Counsel for respondent, however, failed to inform the court that Mr. McCarthy did not follow up his intention to charge admission for the use of the property and that petitioners never operated the property as a private beach [R. 310].

Mr. McCarthy testified that the suggestion referred to in the advertisement that the property be operated as a private beach was not his but that of a man on the Hermosa Beach newspaper, and further that he investigated the possibility of using his property for such purpose and found "he was entirely wrong." The suggested use was on the fashion of Jones Beach and Mr. McCarthy further stated he found it was a losing proposition with an expenditure of several million dollars [R. 153-154]. There

is no evidence in the record that petitioners had any knowledge that the ordinance in question was under study or in the course of preparation at the time of the publication of said advertisement.

The fact that Mr. McCarthy wrote a letter [Ex. 38] to the City Council requesting it to rezone his property from residential to business almost a year prior to the adoption of the ordinance in question is immaterial to any of the issues raised by the Petition. It will be noted that Mr. McCarthy in said letter stated "that under existing conditions it [petitioners' property] cannot be sold or subdivided" for residential purposes. At that time World War II was in progress and it was difficult to secure labor or materials for residential construction and the war likewise had a corresponding effect on the demand for beach front residential property. Since 1940 it is common knowledge that Southern California has had a tremendous influx in population. Manhattan Beach has increased in population from 6,400 in 1940 to 25,000 in 1951, or an increase of 390% [R. 276]. Since the termination of the war there has been a great demand for beach front residential property.

Also, from 1935 to 1946 there were from 40 to 57 feet of accretions added to petitioners' property[1] [R. 212-215].

---

[1]From 1935 to 1946 at the locations hereinafter mentioned accretions were added to petitioners' property in the amount set opposite each location:

Fourteenth Street	Station	117+50	46 Ft.	[R. 212]
Twelfth Street	"	122+50	49 "	[R. 212]
Eleventh Street	"	127+50	49 "	[R. 213]
Ninth Street	"	132+50	48 "	[R. 214]
Seventh Street	"	137+50	50 "	[R. 214]
Fifth Street	"	142+50	50 "	[R. 215]
Third Street	"	147+50	57 "	[R. 215]
Neptune Avenue	"	152+50	40 "	[R. 215]

Respondent implies that petitioners requested respondent to zone their property for beach recreational purposes (Ans. p. 2). This statement is incorrect. Petitioners' only request to the City Council prior to the adoption of the ordinance in question relative to the zoning of their property was that it be rezoned for "business purposes" [Ex. 38].

Petitioners have no more assurance now than they did at the time this action was filed in the trial court that the State of California will prosecute its condemnation proceedings to judgment and that it would satisfy the same. The case has been pending since 1948 [R. 369] and has never been set down for trial. Yet petitioners have been compelled to pay taxes of approximately $9,000.00 a year on property which is clouded by said condemnation action [Ex. 50].

2. Respondent states that any residence constructed on petitioners' property would be "right on the beach" (Ans. p. 3). This would be true of a residence constructed on any ocean beach. Petitioners' property varies in depth from 174 to 184 feet which is ample under the residential restrictions in the ordinance in question for residential development (Sec. 6B-G of Ord. 502) [R. 20B]. Respondent states that "much of petitioners' property is covered with water during a portion of each day even when the ocean is calm" (Ans. p. 3). This statement is also incorrect. The westerly (oceanward) boundary of petitioners' property is the line of mean high tide which is the average of all high tides [R. 205]. Therefore, when the high tide is at mean or below there will be no water on petitioners' property [R. 205].

Respondent states that during storms or when there are ground swells the major portion of petitioners' property is under water (Ans. p. 3). Under such conditions a portion of petitioners' property will be under water, but there is no evidence that it will be a major portion. In fact, there is no evidence as to what portion would be under water. The mean high tide at petitioners' property is 4.6 feet above mean lower low water [R. 180; Ex. 61], and the maximum theoretical high tide is 8 feet, but such a tide has never been observed [R. 181-182]. If the tide ever reached the theoretical maximum of 8 feet, from 130 to 140 feet of petitioners' property west of the proposed 35-foot roadway would have an elevation above said 8-foot tide[2] [R. 212-215].

Petitioners' expert, Leeds, testified that he would recommend that the foundations of residences constructed on petitioners' property be at an elevation of approximately 20 feet above mean lower low water, which he expressed as being "thoroughly conservative" [R. 225]. Such elevation would be 12 feet above the theoretical maximum high tide of 8 feet.[3]

3. Respondent states that at times waves have been observed "breaking upon and over" the former Pacific Electric right of way which lies easterly of petitioners'

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[2]All distances testified to by Colonel Leeds at pages 212-215 of the printed record were from the center line of the former electric railway right of way. The west line of the proposed 35-foot roadway is 60 feet (35+25) west of said center line. Consequently, the figures 130 to 140 feet stated above were arrived at by deducting 60 feet from each of the figures testified to by Colonel Leeds.

[3]The suggested elevation of 20 feet for the foundations of houses on petitioners' property is 3 feet higher than the walk (being the top of sea wall) in front of the houses in Hermosa Beach to the south of petitioners' property shown in the frontispiece [R. 224; Exs. 18 and 61].

property (Ans. p. 3). The evidence does not bear out this statement. As we will presently point out, the evidence shows that the high water referred to occurred in 1933. There is no evidence of waves splashing on or encroaching upon the electric railway right of way or anywhere near it since 1935. Between 1935 and 1946 from 40 to 57 feet of accretions were added to petitioners' property [R. 212-215].

Although the zoning ordinance was passed in 1941, it was challenged before the respondent's Planning Commission in 1950 [R. 21-22] and this action was brought in 1951 [R. 7]. The validity of Section 10 of the zoning ordinance is to be determined on the facts as they existed at the time it was challenged and not at the time of its enactment. This court has repeatedly held that a statute valid when enacted may become invalid by a change in the conditions to which it is applied (*Abie State Bank v. Bryan*, 282 U. S. 765, 776; *Nashville, Chattanooga & St. Louis Ry. Co. v. Walters*, 294 U. S. 405, 415).

The only testimony in the record as to the extent of high water on petitioners' property at time of high tide and storm was given by two witnesses who testified for respondent, both of whom were employees of respondent. One of the witnesses, Mr. Flannigan, secretary to the Planning Commission, testified that on one occasion since 1925 at time of high tide and storm he observed that breakers would break at about the line of the seaweed or kelp [approximately at the wheel lines along the beach appearing in the picture on the frontispiece in the Petition and marked by the witness with an X on Exhibit 1] and "come up a grade farther than shown on the exhibits" and as he expressed it "come up to, you might say, the westerly

edge of the P. E. right-of-way, or splash over that," and that was the highest he had ever seen the water during that time [R. 267-269]. The witness did not state when he observed the high water referred to but related it to the time a barge drifted up on the beach [R. 267]. The other witness, Mr. Sights, Chief of Police of respondent City, stated this occurred 17½ years prior to the trial or in 1933 [R. 298].

Mr. Sights testified that he had been a resident of Manhattan Beach for approximately 30 years and during that time on one or two occasions (one of which he remembered was 17½ years ago) he had seen water against the "westerly edge" of the Pacific Electric right of way [R. 293, 298, 299]. Whether the "water" referred to was the result of ocean spray or the run of the waves is not shown.

Petitioners' expert, Leeds, was cross-examined as to the extent of wave action on petitioners' property above the 8-foot maximum theoretical high tide. He testified in substance that the contour of a beach is normally a pretty good indication of just how far the waves have gone in times past; the crest of the beach (petitioners' property) is normally around 12 to 15 feet which indicates that that is as far as the waves have traveled landward with their suspended sand and have dropped it before receding into the ocean; that he wouldn't anticipate any waves reaching the proposed 35-foot roadway on the easterly side of petitioners' property, but even if they did the most severe waves would scour out the beach as it has in times past to maybe a depth of one or two feet and succeeding lesser waves will fill it up again and houses built upon the property would be perfectly safe; the existing profile of petitioners' property is a pretty

good indication as to what has occurred in the past; there is no indication that the electric railway right of way was cut out in the region of petitioners' property and no riprap was placed in order to protect it [R. 222, 229, 230].

The fact that neither the right of way nor the westerly portion of petitioners' property has been cut in recent years by wave action is clearly shown by the fact that at the time of the trial foliage was growing on said area except at the south end where an outcropping of soil exists (see frontispiece to Petition) [R. 37].

Moreover, petitioners' property is not located in a zone of erosion or severe wave action since *there is a ridge in the ocean floor out in front of the Manhattan-Hermosa area.* This underwater configuration of the earth prevents the concentration of waves or ground swells from submarine fjords or chasms such as occur at La Jolla and Redondo Beach, California [R. 228].

4. Respondent states (Ans. p. 3) that the area (petitioners' property) is of such a character that it would not be usable for structural development because of ocean and tides [citing the record at p. 283, being the testimony of Mr. Petrie, City Manager of respondent]. This conclusion of the witness is not supported by any competent evidence. Respondent introduced no evidence on that subject. Mr. Petrie, as a reason for his conclusion that the ordinance was proper, stated that the ocean and the tides affected the area to such a degree "that you wouldn't use it for structural development" [R. 283]. The other reasons expressed by the witness [R. 290] (quoted in the Petition on p. 28) show that the effect of the ocean and tides on petitioners' property was not the basis for his

conclusion. Mr. Petrie was qualified as a zoning expert, not as a sea coast engineer. There is no evidence that he made any study of the effect of the ocean and tides on petitioners' property or any other property in the vicinity, nor that he was qualified as an expert on that subject.

5. Respondent states (Ans. p. 3) that the contour of petitioners' property is of a sharp slope to the ocean varying from one foot in ten to two feet in ten. Such a contour does not indicate that petitioners' property is not suitable for residential development. Petitioners' expert, Leeds, whom respondent stipulated was eminently qualified [R. 158], stated in his opinion that on such a contour [which is shown on Ex. 62] it was practicable and feasible to construct dwellings on petitioners' property [R. 222], and such evidence was not contradicted.

6. Respondent states that the trial court observed that the westerly side of petitioners' proposed 35-foot roadway is at least 12 feet lower than the electric railway right of way (Ans. p. 4). The trial judge so stated, but an analysis of his remarks shows he made no accurate measurements and was referring to an area north of the pier [R. 317]. The profile of petitioners' property north of the pier prepared by the City Engineer of respondent and introduced in evidence as Exhibit D shows that at Twelfth Street, located approximately 250 feet north of the pier, the center line of the electric railway right of way is approximately 8 feet above the westerly line of the proposed 35-foot roadway.

7. Respondent states (Ans. p. 4) that the houses in the City of Hermosa Beach visible in the photographs in the frontispiece to the Petition are at least 20 feet land-

ward or easterly *"from the westerly or seaward line of any houses which might be constructed on petitioners' property* [Court view, R. 320]." The trial judge's remarks in his oral ruling [R. 320] do not support respondent's statement. The trial judge in speaking of 20 feet was talking about a hypothetical situation in the City of Hermosa Beach. Moreover, respondent's argument assumes that there was a westerly or seaward line for houses which might be constructed on petitioners' property. Necessarily, no "westerly or seaward [building] line" is established on petitioners' property by the ordinance here challenged, for the ordinance forbids the erection of any building thereon. No regulation establishing a front or rear building line on petitioners' property is shown by the record.

8. Respondent's statement (Ans. p. 4) that "The ordinance refers to The Strand and limits structures to four feet above the nearest portion of The Strand" is inaccurate and perhaps misleading. In this particular we call the court's attention to the provisions of Section 10-C-1 of the ordinance: "No buildings, structures, walls, or fences shall be erected in the B-1 District, except lifeguard towers and open smooth wire fences neither of which shall have a height greater than four feet above the grade of the nearest portion of *the strand*" [R. 20B]. The ordinance does not refer to the walkway known as "The Strand." The word "strand" as used in the portion of the ordinance above quoted very definitely means the shore or the beach. This is the common under-

standing and usage of the term as disclosed by an examination of any dictionary in common use. This erroneous construction of the ordinance by respondent is consistent with the similar erroneous construction of the ordinance reflected in the finding of the trial court [Fdg. II, R. 37]. But even if we assume respondent's erroneous construction is correct, it would not follow that the uses permitted, viz., authority to construct lifeguard towers and fences to a height of from 8 to 40 feet above the surface of the beach would compensate petitioners for the uses denied by the terms of the ordinance. The uses denied are not alone for residential uses but any reasonable and profitable use. Permissive use in connection with recreational purposes is likewise in effect a complete denial of use, for petitioners are not permitted to maintain rest rooms, comfort stations, first aid stations, dressing rooms, locker rooms or showers, buildings for housing of beach recreational facilities that may be rented, restaurants, soft drink stands and the like [R. 20B].

9. Respondent states that in 1940 when petitioners' property was zoned for residential it was a violation of the ordinance to construct a fence thereon (Ans. p. 4). This statement is erroneous.

The zoning ordinance in effect in 1940 is Exhibit 15. There is no provision therein prohibiting the construction of a fence. It is common knowledge that a fence is considered not only appropriate and proper in connection with residential development but often necessary.

10. Respondent states that the ordinance in question contains relief provisions authorizing different uses than beach recreation upon an application to the City Council and that petitioners made no such application (Ans. p. 4). The purported relief provisions referred to are in Sections 10-B and 15-A-1 of the zoning ordinance [R. 208]. It will be noted in Section 15-A-1 that the other uses permitted must be "similar to those mentioned" and "not more obnoxious or detrimental to the welfare of the community than the permitted uses." Section 10-B expressly limits the purported relief provisions so that under no circumstances in any one of the following uses permitted on petitioners' property: "residences, camps, trailer camps, garages, automobile parking lots, theatres, dance halls, shooting galleries, skating rinks, bowling alleys, roller coasters, merry-go-rounds, restaurants, cafes and saloons." The purported relief provisions referred to, therefore, give petitioners no relief whatsoever.

Respondent's Summary of Argument Contains Many Inaccurate Statements of Fact From Which Erroneous Conclusions Are Drawn.

Under the heading "Summary of Argument" (Ans. p. 5) respondent purports to state a summary of the four points discussed later in its Answer. Said summary contains numerous inaccurate statements of fact and erroneous conclusions of law. We will indicate these inaccuracies in this Reply to respondent's four points.

ARGUMENT.

REPLY TO RESPONDENT'S POINT I.

Respondent's Contention That the Zoning Ordinance Does Not Violate the Due Process Clause of the Fourteenth Amendment Is Without Merit.

In its Summary of Argument under Point I respondent states:

> "While said ordinance was under consideration and shortly prior to its adoption petitioners stated that the property could not be reasonably used for residential purposes and requested that it be zoned for beach business purposes * * *." (Ans. p. 7.)

A few lines further on respondent states:

> "After petitioners had by the ordinance in question received the very zoning which they had requested * * *." (Ans. p. 7.)

As we have previously pointed out (*ante* pp. 3-6), prior to the adoption of the ordinance in question petitioners made only one application to the legislative body of the city for change of zone of the property in question. On August 12, 1946, petitioners requested the City Council of Manhattan Beach to rezone said property for "business purposes" [Ex. 38]. The term "beach business purposes" was not used. There is no evidence that at the time petitioners made said application they knew that the zoning ordinance in question was under consideration. The only evidence of a hearing in connection with the adoption of the zoning ordinance was a notice of a hearing before the Planning Commission on November 20, 1946, "on the tentative official zoning map" [R. 363]. The

statement that petitioners evidenced a desire to operate the property in question as a "private beach with an admission charge" (Ans. p. 5) refers to a published advertisement in a local newspaper on August 9, 1940, which we have previously referred to (*ante*, p. 2), Mr. McCarthy testified that after the publication of said advertisement he found the private beach idea was "entirely wrong" and that it would be a losing proposition [R. 154].

Respondent states in its Summary of Argument:

> "Moreover, the county planning expert testified that he recommended the change of zone from residential to beach recreational in order to allow petitioners to make a profitable use of their property." (Ans. p. 5.)

The county planning expert referred to is Mr. Cook who testified for respondent. He did not testify as respondent states. After stating numerous reasons [R. 306-307] why he thought petitioners' property was properly classified as beach recreational, none of which had anything to do with police power, Mr. Cook stated:

> "I therefore recommended to the Planning Commission that they create this beach recreation zone which would give the owners of the property the right to derive an income from it." [R. 307.]

Mr. Cook's testimony does not in any way indicate that beach recreation would permit "profitable use" of petitioners' property or that residential use would not be profitable.

Respondent also asserts:

> "In the case at bar, there is no evidence of *any* diminution in value of petitioners' property result-

> ing from the ordinance. In fact, there is no evidence of any value whatsoever." (Ans. p. 10.)

and concludes that "petitioners failed to prove a taking of property." Respondent's premise is faulty and its conclusion a *non sequitur*.

In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413, relied on by respondent, this court found that the statute there in question purported to abolish "a very valuable estate" in land and that hence "the extent of the taking is great." Extrinsic evidence of value was not averted to in the opinion. Likewise, in *Arverne Bay Const. Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587, 592, the court said:

> "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property." (Italics the court's.)

Diminution of value of property resulting from a regulation is only one species of evidence for consideration in determining if a taking has occurred. When the regulation on its face shows an unreasonable limitation on the use of property, a taking is shown without introducing specific evidence of diminution of value. See also:

> *Ritenour v. Dearborn Tp.*, 326 Mich. 242, 40 N. W. 2d 137, 140-141;
>
> *City of Baltimore v. Cohn* (C. App. Md.), 105 A. 2d 482, 486;
>
> *Henie v. City of Euclid* (C. App. Ohio), 118 N. E. 2d 682, 687-688.

In the case at bar, it is self-evident that Section 10 of the zoning ordinance effectually destroys the usefulness of petitioners' property (*Pumpelly v. Green Bay Co.*, 80 U. S. 166, 181). No reasonable man would attempt to use petitioners' property under the zoning ordinance here in question for beach recreation purposes knowing the facts as shown by the evidence in this case. A few of such facts are: (1) petitioners' property is bounded on two sides by public beach and on the third side by a public park; (2) only lifeguard towers and open smooth wire fences four feet high may be constructed on the property *thus preventing the construction* of restrooms, comfort stations, first aid stations, dressing rooms, locker rooms or showers, buildings for housing of beach recreational facilities that may be rented, and restaurants or soft drink stands; and (3) no parking lot for automobiles may be maintained.

It is common knowledge that in face of such facts petitioners' property could not be operated successfully as a private beach. Courts take judicial notice of those things which are common knowledge to the majority of mankind.

West Ohio Gas Co. v. Commission (No. 1), 294 U. S. 63, 72;

Varcoe v. Lee, 180 Cal. 338, 345;

Red Canyon Sheep Co. v. Ickes, 98 F. 2d 308, 314.

Respondent's contention that evidence of diminution of value is necessary to show a taking in this case is without merit. The limitations of use imposed on petitioners' property by the zoning ordinance here in question clearly constitute a taking under the provisions of the Fourteenth Amendment.

Respondent states that the evidence indicates that both Mr. McCarthy and respondent's witness Mr. Cook believed that at the time the ordinance was enacted that "beach business zoning" would increase the value of the property (Ans. p. 6). This statement finds no support in the evidence. Neither Mr. McCarthy nor Mr. Cook, directly or indirectly, stated that they thought the beach recreation zone would increase the value of petitioners' property. So far as we are aware, the phrase "beach business zoning" was not used by either Mr. McCarthy or Mr. Cook.

Respondent asserts that this case is a belated attempt by petitioners to give an inflated value to their property (Ans. p. 6). This statement is not true. Petitioners seek a court decree that the ordinance in question is invalid. If the ordinance is declared invalid, the petitioners will be permitted to make a reasonable and profitable use of their property and if it is later taken from them in the condemnation proceeding they should be entitled to its reasonable value.

Respondent has failed to justify the unreasonable limitation of the use of petitioners' property. Such unreasonable limitation, as pointed out in the Petition (p. 14), is worse than confiscation since petitioners deprived of its reasonable use are still obligated to pay taxes on their property.

Respondent introduced no evidence showing that beach recreation was a proper classification of petitioners' property. In fact, the testimony of Mr. Cook, who testified for respondent, shows clearly that the classification of petitioners' property as "beach recreation" was to enable

the respondent to acquire a public park on the beach. The witness stated:

> "The intent was to produce a [zoning] plan meeting all of the various zoning needs of the city, and a balanced plan was produced by including, among other things, one section of the city which was eminently suited for it for beach recreation." [R. 306.]

REPLY TO RESPONDENT'S POINT 2.

Respondent Fails to Show That the Zoning Ordinance Had Any Relation to the Legitimate Exercise of Police Power.

In the Summary of Argument, respondent states:

> "The ordinance in question was adopted after numerous public hearings and after intensive study and consideration by, among others, experts in the zoning field." (Ans. p. 6.)

As we pointed out previously (*ante*, p. 13), the evidence shows that only one hearing was held on the ordinance and that was to consider a tentative official zoning map. The evidence does not show that petitioners had any knowledge that the ordinance was being considered prior to its adoption. Respondent also states that the ordinance was adopted as a part of a master plan "to promote the public health, safety, morals and general welfare of the City of Manhattan Beach" (Ans. p. 6). The evidence is to the contrary (Pet. Point 2). Moreover, when Mr. McCarthy challenged the validity of the ordinance in 1950 and made an application to have the property rezoned for residential purposes [R. 14-15] the findings of the Planning Commission and the City Council in denying said application make no reference to an

exercise of the police power or anything related thereto [Ex. 49, p. 2, lines 8-11; R. 21-28]. Likewise, the two zoning experts who testified for respondent, attempted to justify the zoning ordinance in question on grounds that had no relation whatsoever to the police power [R. 290, 306-307].

Respondent contends that the evidence sustains the finding of the trial court that reasonable minds might differ as to the suitability of petitioners' property for residential development (Ans. p. 6). It is to be noted that respondent concedes that residences may be safely constructed on petitioners' property (Ans. p. 13), but states the issue is, was petitioners' property "suitable for residential development" and that one factor for consideration is whether or not "the normal beach residences" would be "free from danger of destruction from the sea." Respondent does not define "The normal beach residence" nor is it mentioned in the evidence.

In support of its contention, respondent relies on the answer of petitioners' expert, Leeds, on cross-examination, referred to in the Petition (pp. 26-27).

The District Court of Appeal in reversing the judgment of the trial court correctly answered this argument when it stated:

> "That was not an answer that reasonable minds might reasonably differ as to the safety of houses *built on pilings*—it was an answer that such minds might reasonably differ as to the safety of houses built *in accordance with the scheme indicated on Exhibit 62.* As indicated by the answer, it might well be that engineers would not agree as to the safety of the one proposed solution,—and that a certain proposed solution might cause differences in

opinion as to the degree of safety. The fact that engineers might not agree as to the safety of a proposed plan, such as the one indicated on Exhibit 62, would not signify that engineers would differ in opinion as to the safety of houses built in accordance with other plans, such as higher, stronger, or differently arranged pilings." [R. 361.] (Italics the court's.)

This is made particularly evident by a consideration of the other testimony of the witness.

Colonel Leeds on cross-examination unequivocally testified that it was "feasible and practicable" to construct residences on petitioners' property [R. 202] and that they "would be perfectly safe" [R. 222]. This testimony was not contradicted. On cross-examination Colonel Leeds testified in part as follows:

> "Q. You don't feel then that the ground swells which you would expect on the basis of your experience would be such as to undermine or render unusable the portion of the property exhibited on Exhibit 62 as, in your opinion, suitable for residence development? A. No, sir. That's a particular reason that I would advocate construction of dwellings on pilings, so that if a totally unanticipated storm would occur, it would simply gouge out the beach. The house would still stand there because those pilings, according to the City Building Ordinance, which I think is wise, are required to be driven fairly deeply to 10 feet below mean lower low water. Therefore the storm could gouge out the beach several feet and the house would be perfectly safe.
>
> Q. It would be rather unsightly on the pier, seeing these pilings under the houses? A. At the time of any storm, the ocean front is unsightly, being spectacular, and when there is a cutting of the beach

such as that, it is rather quickly restored by the ocean forces." [R. 222-223.]

In answer to a question on cross-examination with respect to whether waves would reach the westerly line of the proposed 35-foot roadway, Colonel Leeds stated:

> "It would depend on what elevation the street were given. I think you have a pretty good indication of that from the existing profile. There is no indication that the right-of-way of the Pacific Electric was cut out in this region here; so far as I have been able to observe, there was no riprap deposited as was in the case up in the vicinity of Playa Del Rey." [R. 230].
>
> ". . . and I would say that that (35-foot strip) would be the extreme limit (of any wave). I think the best answer to that is: someone said, 'I know no better way of judging the future than by the past.' I realize it is possible to come south of the boundary of Manhattan Beach and see there that houses have stood. *Even though there is a sea wall in front of them, the beach has built up to practically level of that sea wall, and immediately joining the sea wall in Manhattan Beach there is no indication of serious cutting.*" [R. 230-231.]

Respondent states that the trial court's finding of unsuitability of the property for residential development finds support in certain purported facts listed under seven different paragraphs (Ans. pp. 13-14), most of which we have previously pointed out in this Reply are immaterial or unsupported by the evidence. Of the seven paragraphs there remains for discussion only the part of Paragraph 7 (Ans. p. 14) in which respondent states that "Any residences constructed on the property * * * unless protected by an adequate sea wall * * * would be subject

to constant hazard of destruction by the sea [R. 321]." The record reference is to the trial judge's oral ruling. A complete answer is, as we pointed out in the Petition (p. 27), that the trial judge admitted he was not an expert.

In any event, the language of the trial judge clearly demonstrates that the challenged ordinance went beyond the necessities of the case. The reasoning of the trial judge is to this effect [R. 321]: Unless protected by a sea wall residences on petitioners' property are subject to constant hazard from the sea; therefore all residences (whether protected by a sea wall or not) may be forbidden.

It is common knowledge that on both the Atlantic and Pacific Oceans, beach property has been developed and used for residential purposes. It is not sufficient that it is debatable that petitioners' property is not suited for residential development. The test is "whether the facts in the record rationally sustain" such contention (*Weinberg v. No. Pac. Ry. Co.* (C. C. A. 8th), 150 F. 2d 645, 652). We submit that respondent has failed to point out any competent evidence that supports the finding that reasonable minds might differ as to the suitability of petitioners' property for residential purposes.

Respondent states that it would appear obvious that if residences were constructed in the manner suggested by Colonel Leeds, ocean water might reasonably be expected on occasions to go over the eaves of any residences constructed thereon (Ans. p. 15) and respondent cites page

330 of the record, which are the remarks of the trial judge on oral ruling. Respondent fails to point out that the trial judge corrected his remarks a few pages later in the record where he said:

> "* * * if I created the impression that there would be a level of water up to the eaves, correct it, as that certainly was not my intention." [R. 341.]

Respondent in making such statement overlooks the 40 to 57 feet of accretions added to petitioners' property from 1935 to 1946 [R. 212-215]. This contention is also answered by Colonel Leeds in connection with his testimony to the effect of wave action on the 35-foot roadway where he stated:

> "But if [any wave reached the proposed 35-foot roadway] so, what? As I have said before, it would, under the most severe waves, scour out the beach, as it has in time past, to maybe a depth of 1 to 3 feet, and the succeeding lesser waves will fill it up again." [R. 230.]

Just previous to this testimony the witness also testified that:

> "* * * the crest of the beach is normally at around 12 to 15 feet, which indicates that that is as far as the waves have traveled landward with their suspended sand and have dropped it before they receded again into the ocean." [R. 230.]

Respondent contends that the testimony of the Chief of Police of respondent supports the relationship of said ordinance to public morals [Ans. p. 15]. It claims that

even though he wasn't familiar with police problems where homes were built on pilings, it was the same problem as he then had with respect to the municipal pier "since it matters not what structure is *over* the piling" (Ans. p. 16). The statement of this contention shows its fallacy. Police problems at a municipal pier which is open to the public and which is easily accessible are entirely different problems than would be experienced on private property occupied and used for residential purposes with access only obtained by trespassing on private property.

Respondent cites the case of *Cusack Co. v. City of Chicago,* 242 U. S. 526, involving the construction of billboards as supporting the validity of the ordinance in question. Said case is not in point. An ordinance of the City of Chicago prohibited the erection of billboards in any area "used exclusively for residential purposes" (p. 527) without first obtaining the consent in writing of one-half of the property owners on both sides of the street. The court pointed out that billboards as a class were distinguishable from buildings and fences. Such a limitation on the use of residential property does not begin to compare to the limitations placed on petitioners' property by the ordinance in question. There is no suggestion in the case at bar that residences on petitioners' property would be a nuisance (see *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 122, distinguishing the *Cusack* case).

REPLY TO RESPONDENT'S POINT 3.

Motive of Legislative Body in Enacting the Ordinance in Question Was Material and Relevant on the Question of Its Validity.

Respondent contends that the ordinance in question was not actuated by improper motive and that none is shown by the evidence (Ans. p. 17). Respondent fails to acknowledge the obvious.

From 1924 to 1938 respondent claimed title to the property and clouded the title by a quiet title action. When respondent was unsuccessful in the litigation, it used every means at its disposal for the immediately succeeding three years to have some public agency assist respondent in an effort to acquire the property for public park purposes. When those efforts failed, respondent conceived and in 1941 consummated the idea of zoning the property for recreational purposes, thereby preventing any improvements from being constructed on the property and making it available for public use. The motive of respondent is characterized by Mr. Justice Schauer in his dissenting opinion in the Supreme Court of the State of California when he stated:

> "* * * it [the zoning ordinance in question] smacks more of calculated and arbitrary confiscation by a police state. Besides all that, I should like to think that the scheme here resorted to was beneath the honor of a self-respecting American municipality." [R. 387.]

Respondent states that no proper evidence of motive or purpose was before the court since no city official was called to the witness stand to testify as to the nature of the motive. The official acts of the legislative body of respondent as set forth in various resolutions and documents in evidence [Exs. 20 to 37, incl., 39, 40, 42 to 46, incl.] definitely establish the motive of respondent in enacting the zoning ordinance in question. Had respondent at the time of trial thought otherwise, it is difficult to explain why it did not call upon city officials to give testimony of a different motive.

Respondent asserts that the difficulty petitioners had in attempting to construct the fence in 1940 is not germane to the issue and the reasonableness of the zoning ordinance. The legislative body of respondent was informed almost a year prior to the enactment of the zoning ordinance of the difficulties petitioners had in enclosing their property [Ex. 37]. With such knowledge, respondent then adopted the zoning ordinance deliberately prohibiting all uses except for recreational purposes on the pretense that permitting a fee to be charged for its use would make the property income producing. This mask is shown by the provisions of the ordinance limiting its enclosure to a fence of *"open smooth wire"* and by prohibiting all structures allied with a beach recreation use.

REPLY TO RESPONDENT'S POINT 4.

General Zoning Principles Have No Application to the Case at Bar.

This court has long recognized the right of cities under a legitimate exercise of the police power to zone property. But on numerous occasions it has pointed out that the exercise of the police power is not unlimited, and that there is no unrestricted authority to accomplish what the public may presently desire. The police power is subordinate to constitutional limitations and where the zoning ordinance is arbitrary and unreasonable the courts will disregard mere form and interfere for the protection of the rights of the persons injuriously affected. We call the court's attention to the cases cited on page 31 of the Petition.

In its Answer (p. 22), respondent, under the heading "Conclusion," cites the case of *City of Miami Beach v. Hogan,* 63 S. 2d 493, in which this court denied certiorari, 346 U. S. 819. This case is not in point. The property owner there sought to *appreciate* the value of his property by having the zoning which had been in effect for thirty-two years changed to a more profitable use *after* the city had commenced an action to condemn the property for park purposes. In the case at bar, respondent *depreciated* the value of petitioners' property as a prelude to the institution of the condemnation proceedings.

Conclusion.

The District Court of Appeal of the State of California in unanimously reversing the judgment of the trial court said:

> "In practical effect section 10 of the ordinance, as applied to appellants' property, is confiscatory and constitutes a taking of plaintiffs' property for public use without compensation and without due process of law. Under the evidence here, said section, as applied to plaintiffs' property, is unconstitutional and invalid." [R. 365.]

We submit that the above conclusion of the District Court of Appeal is correct and that the majority conclusion of the Supreme Court of the State of California to the contrary, is erroneous.

For the reasons urged in the Petition and in this Reply, we submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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